

Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
Q-01-305-07 OF 2012
RAUS SHARIF PCA, RAMLY ALI AND ALIZATUL KHAIR JJCA
25 SEPTEMBER 2013

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Civil Procedure — Mode of commencement of proceedings — Whether present application ought to be commenced under O 53 of the Rules of the High Court 1980 — Native customary right-related claims — Whether ought to be commenced by way of writ or judicial review

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Land Law — Customary land — Right to — Native customary rights over land — Alienation and issuance of provisional lease over part land by Superintendent of Lands and Surveys — Whether constitutional and lawful — Whether action caught by limitation

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This was an appeal against the decision of the High Court in striking out the appellants' (the plaintiffs') suit under O 18 r 19 of the Rules of the High Court 1980 ('RHC'). The plaintiffs, Berawan by race and natives of Sarawak, claimed that they had acquired native customary rights ('NCR') over three parcels of land which were allegedly owned and occupied by their grandparents. The plaintiff's complaint was that the Superintendent of Lands and Surveys Miri Division (the second defendant) and the State Government of Sarawak (the third defendant) had alienated and issued a provisional lease over part of their NCR land to Boustead Pelita Sdn Bhd (the first defendant) without their knowledge. It was submitted by the plaintiffs that the issuance of the provisional lease was unconstitutional and unlawful as it impaired the plaintiffs' NCR over their land without extinguishing their NCR and ensuring that adequate compensation was provided for under the Land Code. In resisting the plaintiffs' claim, the second and third defendants argued that the plaintiffs did not have any NCR over the area covered by the provisional lease. The High Court, in striking out the plaintiffs' suit, held that the plaintiffs used the wrong mode of proceedings as they should have proceeded by way of judicial review under O 53 of the RHC; and that the suit was barred by limitation under s 2(a) of the Public Authorities Protection Act 1948 ('PAPA') and Sarawak Limitation Ordinance ('Ordinance'). In the present appeal, the issues that arose for the court's determination were whether the action should have been commenced by way of judicial review instead of a writ; and whether the plaintiffs' claim against the defendants was caught by limitation.

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Held, dismissing the appeal:

- (1) NCR-related claims is not solely and/or exclusively within the domain of

- A public law. It is a mixture of public and private law. Given that, the private law element in NCR related claims is so great in that it affects the very livelihood of the natives of the state of Sarawak, the private law element is more dominant than the public law element attached to NCR claims. The plaintiffs were right in filing this action by way of a writ and not by way of judicial review under O 53 of the RHC. The judge's finding was clearly misconceived (see para 18).
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- (2) The plaintiffs' cause of action against the second and third defendants accrued after the issuance of the provisional lease. Given this scenario and premised on the 36 months limitation provided under s 2(a) of the PAPA, there could be no doubt that the plaintiffs' action against the second and third defendants was time-barred as the suit was brought nearly 20 years after the issuance of the provisional lease which was beyond the statutory timeline permitted. The judge was right in striking out the writ of summons filed against the defendants by reason that the plaintiffs' claim against them was statute-barred under s 2(a) of the PAPA and item 97 of the Ordinance (see paras 20, 37–38).
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[Bahasa Malaysia summary]

- E Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam membatalkan tindakan perayu-perayu ('plaintif-plaintif') di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif-plaintif, bangsa Berawan dan anak watan Sarawak, mendakwa bahawa mereka telah memperolehi hak-hak adapt anak watan ('HAAW') ke atas tiga bidang tanah
- F yang didakwa dimiliki dan dihuni oleh datuk nenek mereka. Aduan plaintif adalah bahawa Penguasa Tanah dan Survei Bahagian Miri ('defendan kedua') dan Kerejaan Negeri Sarawak ('defendan ketiga') telah memindahkan dan mengeluarkan pajakan sementara ke atas bahagian tanah HAAW mereka kepada Boustead Pelita Sdn Bhd ('defendan pertama') tanpa pengetahuan mereka. Ia diujahkan oleh plaintif-plaintif bahawa pengeluaran pajakan sementara adalah tidak berperlembagaan dan salah di sisi undang-undang kerana ia mengurangkan HAAW plaintif-plaintif ke atas tanah mereka tanpa membayar HAAW mereka dan memastikan bahawa pampasan yang mencukupi diberikan di bawah Kanun Tanah. Dalam menolak tuntutan
- G plaintif-plaintif, defendan-defendan kedua dan ketiga berhujah bahawa plaintif-plaintif tidak mempunyai apa-apa HAAW ke atas kawasan yang dilindungi oleh pajakan sementara tersebut. Mahkamah Tinggi, dalam membatalkan tindakan plaintif-plaintif, memutuskan bahawa plaintif-plaintif menggunakan cara salah prosiding kerana mereka patut meneruskan melalui semakan kehakiman di bawah A 53 KMT; dan bahawa tindakan tersebut
- H dihalang oleh had masa di bawah s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA') dan Ordinan Had Masa Sarawak ('Ordinan'). Dalam rayuan ini, isu-isu yang berbangkit untuk penentuan Mahkamah adalah sama ada tindakan patut dimulakan melalui semakan kehakiman bukan writ; dan
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sama ada tuntutan plaintif-plaintif terhadap defendan-defendan dihalang oleh had masa.

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Diputuskan, menolak rayuan:

- (1) Tuntutan-tuntutan berkaitan HAAW bukan satu-satunya dan/atau eksklusif dalam lingkungan undang-undang awam. Ia adalah campuran undang-undang awam dan persendirian. Oleh itu, unsur undang-undang persendirian dalam HAAW berkaitan tuntutan-tuntutan adalah sangat besar yang mana ia memberi kesan kepada mata pencarian anak-anak watan negeri Sarawak, unsur undang-undang persendirian adalah lebih berpengaruh daripada unsur undang-undang awam yang terdapat pada tuntutan-tuntutan HAAW. Plaintif-plaintif adalah betul dalam memfailkan tindakan ini melalui writ dan bukan melalui semakan kehakiman di bawah A 53 KMT. Dapatan hakim jelas salah tanggap (lihat perenggan 18).
- (2) Kausa tindakan plaintif-plaintif terhadap defendan-defendan kedua dan ketiga terakru selepas pengeluaran pajakan sementara. Mengambil kira senario ini dan berdasarkan had masa 36 bulan yang diperuntukkan di bawah s 2(a) PAPA, tidak dapat disangsikan bahawa tindakan plaintif-plaintif terhadap defendan-defendan kedua dan ketiga adalah dihalang masa memandangkan tindakan dikemukakan hampir 20 tahun selepas pengeluaran pajakan sementara yang mana adalah melampaui had masa statutori yang dibenarkan. Hakim adalah betul dalam membatalkan writ saman yang difailkan terhadap defendan-defendan atas alasan bahawa tuntutan plaintif-plaintif terhadap mereka adalah dihalang masa di bawah s 2(a) PAPA dan item 97 Ordinan (lihat perenggan 20, 37–38).]

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Notes

For a case on whether present application ought to be commenced under O53 of the Rules of the High Court 1980, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5735.

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For cases on right to customary land, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3220–3222.

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Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)

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Director of Forest, Sarawak & Anor v Balare Jabu & Ors And Another Appeal [2012] 7 CLJ 685, FC (not folld)

Jalang ak Paran & Anor v Government of the State of Sarawak & Anor [2011] 3 MLJ 13; [2011] 3 CLJ 469, CA (refd)

- A *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383, HC (folld)
O'Reilly v Mackman [1982] 2 All ER 1124, HL (consd)
Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor [2005] 2 MLJ 555; [2004] 4 CLJ 775, HC (refd)
- B *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137, FC (overd)

Legislation referred to

- C Limitation Ordinance (Sarawak) (Cap 49) Schedule, Items 72, 97, 110, 112
Public Authorities Protection Act 1948 s 2, 2(a)
Rules of the High Court 1980 O 14A, O 18 r 19, O 53
Sarawak Land Code (Cap 81)

Appeal from: Suit No MR-12–9 of 2011 (High Court, Miri)

- D *Baru Bian (Baru Bian & Solicitors) for the appellant.*
Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) for the first respondents.
JC Fong (Lonie ak Pinda with him) (State Counsel, Sarawak State Attorney General's Chambers) for the second and third respondent.

- E **Raus Sharif JCA (delivering judgment of the court):**

INTRODUCTION

- F [1] This is an appeal against the decision of the learned High court judge sitting at Miri, given on 31 May 2012, in striking out the appellants' suit under O 18 r 19 of the Rules of the High Court 1980 ('RHC').

- G [2] The appellants' suit was struck out on two grounds. Firstly, for using the wrong mode of proceedings. Secondly, the suit was barred by limitation under s 2(a) of the Public Authority and Protection Act 1948 ('PAPA') and Sarawak Limitation Ordinance (Cap 49) ('SLO').

- H [3] The appellants are the plaintiffs and the respondents are the defendants. For convenience parties are to be referred to as in the High Court.

BACKGROUND FACTS

- I [4] The relevant background facts are these. The plaintiffs are Berawan by race and natives of Sarawak. They claimed that they had acquired natives customary rights ('NCR') over three parcels of land which were shown in a map marked 'M' annexed in the statement of claim ('NCR land'). It was the plaintiffs' case that the NCR land was owned and occupied by their grandparents in accordance with their custom. The complaint by the plaintiffs

was that the Superintendent of Lands and Surveys Miri Division (second defendant) and the State Government of Sarawak (third defendant) had alienated and issued a provisional lease over part of their NCR land to a company known as Boustead Pelita Sdn Bhd (first defendant) on a date unknown to them and without their knowledge. The plaintiffs contended that the issuance of the provisional lease by the second defendant and third defendant was unconstitutional and unlawful as it impaired their NCR over their land without first extinguishing their NCR and ensuring that adequate compensation was provided for under the Land Code.

[5] The second defendant as well as the third defendant resisted the plaintiffs' claim. It is their pleaded defence that the plaintiffs did not have any NCR and have not acquired any NCR within the area covered by the provisional lease to the first defendant. The second and third defendants also pleaded that the locality map marked 'M' annexed to the plaintiffs' statement of claim was not an official map, which is inaccurate, therefore rendering it inadmissible as evidence. By reason thereof, it is the second and third defendants bone of contention that the plaintiffs' claim against them was misconceived, frivolous, vexatious and an abuse of the process of the court. To this end, a notice was given by the defendants to the effect that their defence was filed without prejudice to their right to make an application to strike out the Plaintiffs' action against them.

[6] The first defendant did file their appearance. However, subsequent to this the first defendant filed an application (encl 6) to strike out the plaintiffs' suit on the ground that it was scandalous, frivolous or vexatious or was otherwise an abuse of the process of the court.

[7] The second and third defendants thereafter filed a similar application (encl 7) to strike out the plaintiffs' suit. All the defendants then applied to the learned High Court judge to decide on the questions of law posed pursuant to O 14A of the RHC, and, in the event the questions are determined in favor of the defendants then the plaintiffs' action be struck out under O 18 r 19 of the RHC. The questions posed were as follows:

- (a) Whether the plaintiffs' challenge against the issuance of a provisional lease for Lot 8 Block 22 Tinjar Land District (formerly known as Lot 3 Block 22 Tinjar Land District) by the Superintendent of Lands and Surveys pursuant to powers under the Land Code ought to have been by way of judicial review and not by way of this present writ action;
- (b) Whether the plaintiffs' claims and the relief sought are barred by reason of the Limitation Ordinance of Sarawak (including Items 72, 97, 110 and/or 112 of the Schedule thereto) and/or s 2 of the Public Authorities Protection Act 1948; and

- A (c) Whether the first defendant's right, title and interest as registered proprietor of Lot 8 Block 22 Tinjar Land District (formerly known as Lot 3 Block 22 Tinjar Land District which is derived from Lot 23 Tinjar Land District and which Lot 23 is derived from Lot 12 Tinjar Land District) is indefeasible and free of the plaintiffs' claims of alleged native customary rights as pleaded in the statement of claim.
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[8] On the first question of law, the learned High Court judge held that on the facts and circumstances of the case, the plaintiffs should have proceeded by way of judicial review under O 53 of the RHC to challenge the decision of the second defendant in issuing the provisional lease to the first defendant instead of by way of writ action. On the second question of law, the learned High Court judge found that the plaintiffs' claim by writ action filed in 2011 was barred by reasons of the SLO and s 2(a) of the PAPA. As for the third question, the learned High Court judge ruled based on another case he had previously decided that, in the event the plaintiffs have acquired NCR over the land; the first defendant's claim to indefeasibility of title by virtue of it being the registered owner cannot preclude the plaintiffs' claim to their NCR land.

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[9] The plaintiffs' action was struck out under O 18 r 19 of the RHC. Aggrieved by the High Court decision, the plaintiffs preferred an appeal to the Court of Appeal.

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ISSUES AND FINDINGS

- F [10] Before us, two main issues were canvassed by the parties, namely:
- (a) whether the action should have been commenced by way of judicial review instead of a writ; and
- G (b) whether the plaintiffs' claim against the defendants was caught by limitation.

We shall deal with the two issues in turn.

(a) *Judicial review point*

H [11] In the present case, the learned High Court judge found that the impairment of the plaintiffs' NCR lands by the issuance of the provisional lease by the second defendant to the first defendant under the Land Code lie in the realm of public law. Thus, His Lordship held that the plaintiffs should have proceeded by way of judicial review pursuant to O 53 of the RHC to challenge the decision of the second defendant instead of by way of writ action. The learned High Court judge in so doing relied on the authorities of *Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* [2005] 2 MLJ 555; [2004] 4 CLJ 775; *Jalang ak Paran & Anor v Government of*

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the State of Sarawak & Anor [2011] 3 MLJ 13; [2011] 3 CLJ 469; and *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145.

[12] The above mentioned authorities relied on by the learned High Court judge were decided based on the authoritative pronouncement of the House of Lords in *O'Reilly v Mackman* [1982] 2 All ER 1124 (*O'Reilly*). We would like to state here that the case of *O'Reilly* has an important bearing in this appeal for the reasons we would state in the latter part of this judgment. Having said that, we do not propose to go into the details of the said judgment, suffice to highlight the general principles which were propounded. The House of Lords in *O'Reilly* held that, as a general rule, a plaintiff who alleges infringement by a public authority of his rights must do so by way of judicial review as it is against public policy and an abuse of the courts process to allow him to proceed by way of an ordinary action. Lord Diplock MR laid emphasis for the aforesaid principle in his illuminating judgment which is reproduced as follows:

... it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of s 53 for the protection of such authorities.

Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis...

[13] Clearly as can be seen from the above quoted passage, Lord Diplock in delivering the judgment of the court had laid down this principle to operate as a general rule only. His Lordship did not define the category of cases which fall within this general rule and acknowledged that there are certain exceptions to this rule. This was clearly reflected in the latter part of his judgment where His Lordship held that:

... I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

... *there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.*

(Emphasis added.)

[14] Based on the recognition given by Lord Diplock in *O'Reilly* that exceptions do exist to the general rule, the overriding question before us now in

A the present appeal at hand is whether the action filed by the plaintiffs being a NCR's claim fall squarely within this exception. Put simply, were the plaintiffs right in instituting this action by way of writ given that this is an action to challenge the decision of a public authority which is well within the domain of public law.

B [15] A good guide for the courts to follow in ascertaining the proper mode of proceedings in public law matters can be seen in the Federal Court case of *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. James Foong FCJ held at pp172–173 (MLJ); p 897 (CLJ):

C We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action is under O 53 is not suitable... Much depends on the facts of the case.

D [16] The above mentioned principle was reiterated but with an emphasis on NCR related cases in the Federal Court case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766. Richard Malanjum CJ (Sabah and Sarawak) in that case, by way of obiter, remarked the following:

E I would like to make another note on the use of O 53 of the RHC 1980 in cases involving native customary rights ... With respect, I find that it is highly unfair and prejudicial to insists upon the natives to proceed by way of O 53 when they seek to enforce a constitutional right by way of a declaration to that effect.

G Although it does, to a certain extent fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognized both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v Mackman* [1982] 3 All ER 1124 principle.

H [17] The view expressed by His Lordship Richard Malanjum CJ (Sabah and Sarawak), albeit obiter, has an important bearing on how the courts should approach cases involving NCR claims. It is pertinent to note that in *Bato Bagi*, Ricard Malanjum CJ (Sabah and Sarawak) referred to and cited with approval the case of *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] 10

CLJ 382 (*Nikodemus Singai*). The facts of *Nikodemus Singai* are akin to the present case at hand wherein the plaintiffs in that case challenged the provisional lease granted by a public authority over areas of land the plaintiffs claimed they have native customary rights. The defendants challenged the action brought by the plaintiffs stating that the action should have been brought by way of judicial review instead of a writ action. Rhodzariah Bujang JC (now High Court judge) took pains to elucidate why cases of this genre (NCR) should be an exception to the *O'Reilly's* principle. Her Ladyship Rhodzariah Bujang had this to say:

... I am of the view that cases involving claims of native customary rights such as this one are an exception to the *O'Reilly's* principle. I came to this conclusion because the prosecution of the plaintiff's right here is a genus in itself for by its very definition that right is largely unsupported by evidence; it is almost purely proved by oral evidence based on customs and tradition and is a peculiarity of only two states—Sabah and Sarawak. For the natives in these two state, — their rights to the land — to forage, to hunt, to fish and to cultivate the land, for it is not just a place to build a home but their very livelihood this right is handed down one generation to the next. To tie them down to the *O'Reilly's* principle when more often than not they would only know about the transgressions of their right when the land had already been dealt with by the state authorities (as in this case) is an irreparable injustice which the Law Lords in *O'Reilly*, I am sure would never have intended.

[18] Justice Rhodzariah Bujang, in her concluding remarks adopted Lord Scarman's words and stated that the private law element in the native customary rights claim is so great as to make it an exception to the general rule as postulated in *O'Reilly*. We agree with Her Ladyship's aforesaid views in *Nikodemus Singai*. We are of the same view that NCR related claims is not solely and/or exclusively within the domain of public law. It is a mixture of public and private law so to speak. Given that the private law element in NCR related claims is so great in that it affects the very livelihood of the natives of the state of Sarawak, we hold that the private law element is more dominant than the public law element attached to NCR claims. The peculiarity and distinct features of the NCR claims make it an exception to the general principle propounded in *O'Reilly*. Thus, we find that the plaintiffs were right in filing this action by way of a writ and not by way of judicial review under O 53 of the RHC. In the result, we hold that the learned judge's finding on this point is, with respect, clearly misconceived.

LIMITATION POINT

[19] The learned High Court Judge held that the plaintiffs' suit was statute barred as it was filed well outside the 36 months limitation period under s 2 of the PAPA and the six years limitation period provided for under Item 97 of the SLO.

- A [20] Learned counsel for the plaintiffs submitted that the issue of the limitation period under s 2 of the PAPA and the SLO has no application since the plaintiffs' prayers were for declaratory orders. To support his argument, he relied on the decision of Court of Appeal and Federal Court in *Director of Forest, Sarawak & Anor v Balare Jabu & Ors And Another Appeal* [2012] 7 CLJ 685 (*Balare Jabu*) and the Federal Court case of *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137 (*Teh Guan Teik*). Further thereto, learned counsel for the Plaintiffs in relying on the case of *Balare Jabu* had submitted that the injury and damage to the plaintiffs is continuous and hence they fall squarely within the confines of the second limb to s 2(a) of the PAPA.
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- C Accordingly, the plaintiffs submitted that so long as the provisional lease remains valid, there is always a threat to the plaintiffs' NCR and their rights thereby entitling them to a valid cause of action. In short, the plaintiffs' stance is that the 36 months' limitation period for continuance of injury under s 2 of the PAPA will only run when the said provisional lease becomes invalid being
- D a continuing injury or damage upon the NCR and rights of the plaintiffs.

[21] We will first deal with the case of *Teh Guan Teik* cited and relied upon by learned counsel for the plaintiffs. In *Teh Guan Teik*, the question was whether the appellant (Teh) who was dismissed from his employment as a police sergeant could pursue the challenge on his dismissal vide a declaration when an action for certiorari was obviously out of time. Peh Swee Chin FCJ had this to say:

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- F If the private citizen was not to be allowed to circumvent the limitations of time for applying, etc of the certiorari by claiming for declaration instead, it would not be difficult to imagine how many such citizens could be, due to lack of expertise in the law of certiorari, barred from seeking justice and the court would have failed to live up to the image the public has, of being an institution of the people to serve the people in the interest of justice.

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- [22] We have read the Federal Court judgment of *Teh Guan Teik* in great detail and with respect we find that the decision of the same cannot possibly lend any assistance in the contextual fact of the matter in issue. We say this as in *Teh Guan Teik's* case the issue before the Federal Court was whether the appellant (Teh) who was dismissed from his employment as a police sergeant could pursue the challenge on his dismissal vide a declaration when an action for certiorari was out of time. Further, we are of the view that with the recent Federal Court decision of *Ahmad Jefri*, the case of *Teh Guan Teik* can no longer be the correct position of the law.
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- [23] Thus what is left for us to consider is the case of *Balare Jabu*. The facts of *Balare Jabu* were these: The plaintiffs were claiming for numerous declaratory reliefs including a claim for NCR over an area of land in Kampong Long Lamai, Miri, Sarawak. The plaintiffs' grievance was against the issuance

of a timber license by the first and second defendant which they sought to declare as null and void in so far as it had impaired their NCR over their land. The defendants filed an application to strike out the plaintiffs' claim on the ground that limitation had set in pursuant to s 2(a) of the PAPA and the Sarawak Land Ordinance. The learned High Court judge in striking out the plaintiff's suit instituted in 2007 was of the considered view that the plaintiff had slept over their rights as the license was granted way back in year 1992. They were said to be aware of the existence of the license and the trespass into their alleged NCR land as early as 1995.

[24] The Court of Appeal reversed the High Court decision and took the view that although limitation may be a complete answer to a suit, action or proceeding for remedy, it is not an answer to a suit, action or proceeding for declaratory orders. Abdul Wahab Patail JCA speaking for the Court of Appeal held that:

[10] While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders. A declaration whether the issuance of a license is subject to native customary rights and whether the second and third respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. Even if it is without orders for compensation or damages, it serves the purpose of providing some solace to the appellants. And they have only their trust to rely upon that the government is committed to and will do what is right. We do not think such trust is misplaced for no legitimate government intends to act unfairly or unjustly per se or in breach of its subjects' constitutional rights. Injustice or unfairness happens only by mistake or unintended error which a true government will seek to remedy without the necessity of an order for compensation and damages.

[25] Aggrieved by the aforesaid decision the defendants appealed to the Federal Court. The sole question of law posed before the Federal Court was:

Whether the defence of limitation under s 2 of the Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders.

[26] The Federal Court in *Balare Jabu* in declining to answer the question of law posed was of the considered view that since the timber license remains valid, it continues to be subjected to the plaintiffs' NCR. Accordingly the Federal Court decided that the second limb of s 2(a) of the PAPA applies, being a continuing injury or damage upon the NCR and rights of the plaintiffs. Hence, the Federal Court ruled that the plaintiffs' claim instituted in year 2007

- A was not caught by limitation. Accordingly the case was sent back for trial at the High Court. Richard Malanjum CJ (Sabah and Sarawak) in delivering the judgment of the court had this to say:
- B We do not think it can simply be said that the respondent's cause of action accrued on the date the license was granted in 1992 or even 1995 as found by the learned High Court Judge and thus falling within the first limb of s 2(a) of the PAPA. In our view, the second limb of the said section should apply, namely, being 'the case of a continuance of injury or damage'. The reason we say so is because based on the uncontroverted facts, in particular the fact that in the license granted it is clearly stated that the date of issue is on 30 March 1992 while the date of expiry is on 29 March 2012. Therefore the license was still valid at the time the action was filed.
- C We also noted that cl 29(a) of the license clearly stipulated thus: This license is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forests Ordinance.
- D As such we are of the view that as long as the license remains valid, it continues to be subject to the respondents' NCR, if any, and rights in respect of the land concerned. Accordingly, the second limb of s 2(a) PAPA applies, being a continuing injury or damage upon the NCR and rights of the respondents.
- E [27] Learned counsel for the plaintiffs in this case relying on the case of *Balare Jabu* had submitted before us that injury and damage to the plaintiffs herein is continuous and hence they fall squarely within the confines of the second limb to s 2(a) of PAPA.
- F [28] We have deliberated on this issue and with respect we find that the case of *Balare Jabu* does not lend any credence to the plaintiffs' case. As found by the Federal Court in *Balare Jabu*, the plaintiffs' NCR was subjected to the timber license which was issued to the defendants in that case. In *Balare Jabu* it was expressly stated in the timber license itself at cl 29(a), *this license is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forest Ordinance* (Emphasis added). Thus, the Federal Court in *Balare Jabu* took cognisance of this and arrived at its decision as it did. However in the instant case, the provisional lease being issued in year 1992 lacks the backing of such provision as in *Balare Jabu*. Hence, we are constrained to agree with the plaintiffs' submission on this point, and we find the plaintiffs' reliance on *Balare Jabu* is misconceived.
- G
- H
- I [29] Having said the above, the issue now is whether the plaintiffs' suit against the defendants is statute barred, namely under s 2(a) of the PAPA and item 97 of the SLO. To determine whether the plaintiffs' suit is time barred we must first ascertain the accrual of the cause of action which gave rise to the filing of the plaintiffs' suit against the defendants and the relevant time limit as mandated by the statute. In this regard we produce the relevant s 2(a) of the PAPA and item 97 of the SLO for ease of reference.

Section 2(a) of the PAPA provides that:

Where, after coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, the following provisions shall have effect:

- (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty six months next after the ceasing thereof

Item 97 of the SLO, on the other hand, provides for the following:

- | | | | |
|-----|---|--------------|-------------------------------|
| 97. | Suit for which no period of limitation is provided elsewhere in this Schedule | Six
Years | When the right to sue accrues |
|-----|---|--------------|-------------------------------|

[30] Under the aforesaid provisions as discussed above it is clear that s 2(a) of the PAPA provides for a limitation period of 36 months from the date of the act, neglect or default complained of against the public authority. In the case of a continuous damage or injury, the second limb to s 2(a) becomes operational wherein the limitation period to bring an action against the public authority will be within 36 months after the ceasing of the alleged neglect or default of the public authority. The limitation period mandated under Item 97 of the SLO to bring an action is six years from the date the right to sue accrues.

[31] We shall first discuss the limitation issues pertaining to the second and third defendants. In discussing whether limitation has set in against the second and third defendants we will have to advert to the facts that gave rise to this suit.

[32] The pertinent undisputed facts of this case, which gave rise to this suit is thus:

- (a) in 1992 ie about 20 years before the filing of the plaintiffs' writ herein, the second defendant exercising its power under the Land Code issued a provisional lease to the first defendant;
- (b) as a result of the provisional lease being granted the said land was alienated to the first defendant and the first defendant became the registered owner, thereafter the said land was developed into an oil palm estate wherein which the plantation was duly completed in year 1994.

[33] Against this backdrop the plaintiffs instituted an action against the defendants. The issue now is when the plaintiffs' cause of action accrued.

- A Looking at the facts objectively it is safe to conclude that the plaintiffs' cause of action against the second and third defendant accrued after the issuance of the provisional lease in 1992. Given this scenario and premised on the 36 months limitation provided under s 2(a) of the PAPA, there can be no doubt that the plaintiffs' action against the second and third defendant is time barred as the
- B suit was brought nearly 20 years after the issuance of the provisional lease which is beyond the statutory timeline permitted.

- [34] However on a different note, assuming there was indeed continuous injury and damage as the plaintiffs allege, can the plaintiffs rely on the second limb of s 2(a) to defeat the issue of limitation? The way we perceive it, the answer to this question lies in the conduct of the plaintiffs on this matter. In this regard, it is undisputed that the plaintiffs took nearly twenty years to bring this action. This clearly shows that if they had any rights indeed, which has
- D been infringed, and as a result thereof they have continued to suffer, an action should have been commenced promptly. However, the facts of this case certainly does not support the existence of a continuing injury or damage as whatever injury was caused by a single act of the second defendant in issuing the provisional lease some 20 years ago. During this time the first defendant
- E managed to complete their oil palm plantation, and there were two compulsory land acquisition on two different occasions. The plaintiffs did not challenge these acquisition. As such the irresistible conclusion that can be drawn from this factual scenario is that whatever rights the plaintiffs have had been defeated as they had slept over it or acquiesced to the infringement of their rights. As
- F rightfully pointed out by learned counsel for the second and third defendants since the plaintiffs did not take any action to protect their purported rights, it raises serious doubts on the bona fides of their NCR claim. Thus, in our judgment, having taken into account the facts and circumstances of the instance case, we find that the plaintiffs' claim against the second and the third
- G defendant is hereby caught by limitation under s 2(a) of the PAPA.

- [35] Insofar as the first defendant was concerned, as we have alluded to in the earlier part of this judgment the limitation period provided for under item 97 of the SLO is six years. In this regard based on Item 97 of the SLO, we find that the plaintiffs' action which was instituted in year 2011 nearly 18 years after the first defendant had finished the oil palm plantation is clearly out of time.
- H

- [36] In the same way, learned counsel for the first defendant also submitted that the plaintiffs' writ action filed against them in 2011 was barred by limitation by reasons as envisaged under Items 72,110,112 of the SLO. For the sake of clarity and reference we hereby reproduce the aforesaid items under the SLO which states as follows:
- I

72	To cancel or set aside an Instrument not otherwise provided for...	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.	A
110	For possession of immovable property, when the plaintiff while in possession of the property, has been dispossessed or has discontinued the possession	Twelve years	The date of the dispossession or discontinuance	B
112	For possession of immovable property or any interest therein not hereby otherwise specially provided for...	Twelve Years	When the possession of the defendant becomes adverse to the plaintiff.	C

[37] Premised on the above, learned counsel for the first defendant submitted that the claim instituted by the plaintiffs is time barred under the aforesaid items of the SLO. We have no hesitation in agreeing with the first defendant's contention on this point. Clearly, even looking at the other Items under the SLO which is consonant with the issue of limitation and which is applicable to the instant case, we can safely conclude that the plaintiffs' action herein against the first defendant is also statute barred.

[38] Under these circumstances we find that the learned judge was right in striking out the writ of summons filed against the first, second and third defendants by reason that the plaintiffs' claim against them was statute barred under s 2(a) of the PAPA and item 97 of the SLO.

[39] For the reasons aforesaid, we dismiss this appeal and in the circumstances of this case, we order that each party to bear their own costs.

Appeal dismissed.

Reported by Afiq Mohamad Noor